

Supreme Court, U. S.  
**FILED**

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MICHAEL ROBAK, JR., CLERK

**IN THE**  
**SUPREME COURT OF THE UNITED STATES**  
**No. 76-879**

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THOMAS E. ZABLOCKI, Milwaukee County Clerk,  
individually, in his official capacity, and on behalf of  
all persons similarly situated,

*Appellants,*

*v.*

ROGER G. REDHAIL, individually and on behalf of  
all persons similarly situated,

*Appellees.*

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**ON APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE  
EASTERN DISTRICT OF WISCONSIN**

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**SUPPLEMENTAL MEMORANDUM OF  
APPELLANTS AND APPELLEES**

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***QUESTION PRESENTED***

- I. Does new legislation passed by the Wisconsin Legislature and signed by the Acting Governor have any affect on the issues in this case?

## STATEMENT OF THE CASE

This is a direct appeal from the final judgment entered August 31, 1976, by order of a three-judge district court, declaring WIS. STAT. §245.10(1), (4) and (5) (1973) unconstitutional and enjoining its enforcement. Oral argument was heard by this Court on October 4, 1977. At argument, the Court directed the parties to inform the Court when the Acting Governor signed legislation which had been passed by the Wisconsin Legislature, and ordered the parties to submit supplemental memoranda discussing the effect of the new legislation on the present case. Because the parties agree that the new legislation has no effect on this case, this memorandum is submitted by both appellants and appellees.

## ARGUMENT

On October 10, 1977, Acting Governor Martin E. Schreiber signed into law a comprehensive revision of Wisconsin laws relating to divorce. This new legislation, Chapter 105, Wisconsin Laws of 1977, will become effective February 1, 1978.

The new legislation does not repeal, amend or modify in any way the present sec. 245.10, the "permission to marry" statute at issue in this case. It does create new section 245.105 which is basically a fall-back "permission to marry" statute affecting a somewhat smaller group of people and applying different standards for the granting or withholding of permission to marry. A copy of the first portions of this law including sec. 245.105 is attached as Exhibit A. Section 245.105 will not become effective automatically, however. Section 245.105(8) states:

"This section is independent of sec. 245.10 and shall be enforced only when the provisions of sec. 245.10 and utilization of the procedures thereunder are stayed or enjoined by the order of any court."

If on or after February 1, 1978, sec. 245.10 is stayed or enjoined by the order of any court, then 245.105 will become effective. If sec. 245.10 is not stayed or enjoined by the order of any court, then sec. 245.10 will remain in effect and 245.105 will not be enforced.

The parties have investigated and have not learned of any pending or completed case in any other court where an injunction against the enforcement of sec. 245.10 has been requested or issued. Moreover, the Attorney General has not been notified of any such action. See Exhibit B attached. Notice to the Attorney General of a declaratory judgment action questioning the constitutionality of a state statute is required in federal cases by 28 U.S.C. §2284(2) and in state cases by sec. 806.04(11), WIS. STATS. (1975). The Wisconsin Supreme Court has strongly suggested notice to the Attorney General where the constitutionality of a state statute is questioned in other state proceedings. *City of Kenosha v. Dosemagen*, 54 Wis. 2d 264, 195 N.W. 2d 462 (1972).

The parties submit that this case is not moot and that the new legislation has no effect on the issues herein. If this Court reverses the district court and vacates the injunction, then 245.10 will again be enforced. If this Court affirms the judgment of the district court, then the injunction will remain in effect and 245.10 will not be enforced. Only then would the new legislation become effective.

The new Wisconsin legislation is analogous to the Texas filing fee legislation enacted in response to a federal injunction against the enforcement of the previous statute and discussed by the Court on appeal in *Bullock v. Carter*, 405 U.S. 135, 141 n. 17. Texas enacted a "contingent, temporary law" which was to go into effect only for one year and only if this Court affirmed or refused to review the judgment of the district court or had not yet disposed of the appeal by a certain date. The Court stated that this sort of change of law did not render the case moot because the lower court's injunction would have effect after the year had expired and because there was a continuing controversy with respect to payment of filing fees for an earlier election. While the Wisconsin Legislature chose a slightly different method, its intention and the effect of the legislation are clearly the same as in the Texas case, i.e., to enact a law the effect of which will be contingent upon this Court's decision in this case. Moreover, there is a continuing controversy about the validity of marriages entered into in violation of the existing statute. As in *Bullock*, the new legislation is not before the Court (except for the limited purpose of the instant inquiry); the need to resolve the issues in this case has not been obviated.

## CONCLUSION

Appellants and appellees urge the Court to decide this case on the merits.

Dated this 21st day of October, 1977.

Respectfully submitted,

WARD L. JOHNSON, JR.  
JOHN R. DEVITT

*Attorneys for Appellants*

ROBERT H. BLONDIS  
PATRICIA NELSON

*Attorneys for Appellees*



**EXHIBIT A****STATE OF WISCONSIN****1977 Assembly Bill 100****Date published\*:  
October 15, 1977****CHAPTER 105, LAWS OF 1977**

AN ACT to repeal 247.02, 247.03 (2), 247.055 to 247.066, 247.101, 247.11, 247.15, 247.18, 247.232, 247.33, 247.34, 247.37 (4) and 247.375; to renumber 247.03 (1) and (3) and 247.19; to renumber and amend 247.12, 247.24 (1) (c) and (2) and 247.32; to amend 59.42 (2) (b), 245.12 (1), 247.02 (1) (f) and (g) as renumbered, 247.045, 247.08 (1), 247.082, 247.10, 247.125, 247.14, 247.22 (1), 247.23 (1) and (2), 247.30, 247.37 (title) and (1) to (3), 247.38, 251.72 (1) and 801.05 (11); to repeal and recreate 247.05, 247.07, 247.081, 247.085, 247.09, 247.21, 247.24 (title) and (1) (a) and (b), 247.245, 247.25, 247.26 and 247.265; and to create 245.105, 247.02 (1) (i), (j) and (k), 247.03, 247.083, 247.12 (2), 247.19 (2), 247.24 (1) (c) and (d) and (lm), 247.255, 247.261, 247.262, 247.263, 247.27, 247.275, 247.305, 247.32 (3) and 632.895 of the statutes, relating to revision of laws applicable to actions affecting marriage.

*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

\* Section 990.05, 1975 Wisconsin Statutes: **Laws and acts; time of going into force.** "Every law or act which does not expressly prescribe the time it takes effect shall take effect on the day after its publication."

**SECTION 1. Purpose.** (1) It is the intent of the legislature to emphasize the present and future needs of the parties to actions affecting marriage and of their children, if any; to move away from assigning blame for a marriage failure; and to promote the settlement of financial and custodial issues in a way which will meet the real needs of all concerned persons as nearly as possible.

(2) It is the intent of the legislature that a spouse who has been handicapped socially or economically by his or her contributions to a marriage shall be compensated for such contributions at the termination of the marriage, insofar as this is possible, and may receive additional education where necessary to permit the spouse to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage. It is further the intent of the legislature that the standard of living of any minor children of the parties be maintained at the level the children would have enjoyed had the marriage not ended, so that insofar as is possible, the children will not suffer economic hardship. It is the intent of the legislature to recognize children's needs for close contact with both parents, to encourage joint parental responsibility for the welfare of minor children and to promote expanded visitation.

(3) It is the intent of the legislature that maintenance payments shall have the same effect for tax purposes as did alimony as provided for in chapter 247, 1975 statutes.

(4) This act is not intended to make a divorce, annulment or legal separation easier to obtain. Its sole purpose is to promote an equitable and reasonable adjudication of the economic and custodial issues involved in marriage relationships.

SECTION 2. 59.42 (2) (b) of the statutes is amended to read:

59.42 (2) (b) All special proceedings independent of an action taken at the instance and for the benefit of one party without notice to or contest by any person adversely interested; and any proceeding under s. 245.10 or 245.105 for court permission to marry, \$4.

SECTION 3. 245.105 of the statutes is created to read:

**245.105 Permission of court required for certain remarriages.** (1) No Wisconsin resident having minor issue of a prior marriage not in his or her custody and which he or she is under obligation to support by any court order or judgment, may remarry, in this state or elsewhere, without the order of either the court of this state which granted the judgment or support order, or the court having divorce jurisdiction in the county of this state where the minor issue resides or where the marriage license application is made. No marriage license may be issued to any such resident except upon court order. The court, within 5 days after permission is sought by verified petition in a special proceeding, shall direct a court hearing to be held in the matter to allow the petitioner to submit proof of compliance with the previous court obligation. No such order may be granted, or hearing held, unless both parties to the intended marriage appear, and unless the person, agency, institution, welfare department or other entity having the legal or actual custody of the minor issue is given notice of the proceeding by personal service of a copy of the petition at least 5 days prior to the hearing, except that such appearance or notice may be waived by the party affected or by the court upon good cause shown. A 5-day notice of the hearing shall be given to the

family court commissioner of the county where permission is sought, who shall attend the hearing, and to the family court commissioner of the court which granted the divorce order or judgment. If the divorce order or judgment was granted in a foreign court, service shall be made on the clerk of that court. Upon the hearing, if the petitioner submits proof of compliance with all such previous court obligations the court shall grant the order, a copy of which shall be filed in any previous marital court action of such petitioner in this state affected thereby; otherwise permission for a license shall be withheld until such proof is submitted, but any court order withholding such permission is an appealable order. Any hearing under this section may be waived by the court if the court is satisfied from an examination of the court records in the case and the family support records in the office of the clerk of court as well as from disclosure by the petitioner of all financial resources that the petitioner has complied with previous court orders or judgments applicable to the support of minor children. No county clerk in this state shall issue such license to any person required to comply with this section unless a certified copy of a court order permitting the marriage is filed with said county clerk.

(2) No nonresident of this state, having minor issue of a prior marriage not in his or her custody and which he or she is under obligation to support by order or judgment of any court in this state or elsewhere, may marry in this state unless he or she has complied with the requirements of sub. (1).

(3) The requirement of subs. (1) and (2) shall establish a rebuttable statutory presumption that a remarriage by any parent who is obligated by court order or judgment to provide support for any child not in his or her custody may substantially affect that child's right of



support. Such presumption may be overcome by sufficient contrary proof submitted to the court. Notwithstanding subs. (1) and (2), permission to remarry may likewise be granted to any petitioner who submits clear and convincing proof to the court that for reasonable cause he or she was not able to comply with a previous court obligation for child support.

(4) If a Wisconsin resident having such support obligations of a minor, as stated in sub. (1), wishes to marry in another state, the resident must, prior to such marriage, obtain permission of the court under sub. (1), except that in a hearing ordered or held by the court, the other party to the proposed marriage, if domiciled in another state, need not be present at the hearing. If such other party is not present at the hearing, the judge shall within 5 days send a copy of the order of permission to marry, stating the obligations of support, to such party not present.

(5) This section shall have extraterritorial effect outside the state; and s. 245.04 (1) and (2) are applicable hereto. Any marriage contracted without compliance with this section, where such compliance is required, shall be void, whether entered into in this state or elsewhere.

(6) This section shall not apply to any party described in sub. (1) or (2) who applies for a license to remarry the parent of the child or children whom that party is under court obligation to support, provided said party is not likewise under court obligation to support any other child.

(7) Any person who obtains a marriage license contrary to or in violation of this section, whether such license is obtained by misrepresentation or otherwise,

or whether such marriage is entered into in this state or elsewhere, shall be fined not less than \$200 nor more than \$1,000, or imprisoned not more than one year in the county jail, or both.

(8) This section is independent of s. 245.10 and shall be enforced only when the provisions of s. 245.10 and utilization of the procedures thereunder are stayed or enjoined by the order of any court.

SECTION 4. 245.12 (1) of the statutes is amended to read:

245.12 (1) If ss. 245.02, 245.05, 245.06, 245.08, 245.09, and 245.10 or 245.105 where applicable, are complied with, and if there is no prohibition against or legal objection to the marriage, the county clerk shall issue a marriage license; but after the application for such license ~~said~~ the clerk shall, upon the sworn statement of either of the applicants, correct any erroneous, false or insufficient statement in such license or in the application therefor which shall come to ~~his~~ the clerk's attention prior to the marriage and shall show the corrected statement as soon as reasonably possible to the other applicant.

SECTION 6. 247.02 of the statutes is repealed.

SECTION 6m. 247.02 (1) (i), (j) and (k) of the statutes are created to read:

247.02 (1) (i) To modify a judgment in an action affecting marriage granted in this state or elsewhere.

(j) For periodic family support payments.

(k) To seek court permission to remarry under s. 245.105.

/s/ George B. Schwahn  
Notary Public, State of Wisconsin  
My commission is permanent.